

**BIENSTOCK & CLARK**

A Partnership Including Professional Associations  
311 SOUTH WACKER DRIVE, STE. 4850  
CHICAGO, ILLINOIS 60606  
TELEPHONE: 312-697-4866  
FACSIMILE: 312-697-4866

DOCKET FILE COPY ORIGINAL

**RECEIVED**

SEP - 4 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Lisa M. Chandler**

Also admitted in the District of Columbia

September 4, 1998

**VIA COURIER**

**Ms. Magalie Roman Salas**

**Secretary**

**Federal Communications Commission**

**1919 M Street, N.W.**

**Room 222**

**Washington, D.C. 20554**

Re: **RM Nos. 9345 and 9335**  
**Comments of the Small Cable Business Association**

Dear Ms. Salas:

On behalf of the Small Cable Business Association ("SCBA"), we enclose ten (10) copies of the above-referenced Comments. We request that each Commissioner receive a copy of SCBA's Comments.

If you have any questions, please call us.

Very truly yours,

*Lisa M. Chandler*

Lisa M. Chandler

Enclosures

cc: Small Cable Business Association

No. of Copies rec'd  
List ABCDE

0710

Inc:SCBA: A:\nrc\_echo\star\petrm\_comments.tra

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**Petition for Declaratory Ruling and )  
Rulemaking with Respect to )  
Defining, Predicting and Measuring ) RM No. 9345  
Grade B Intensity for Purposes of )  
the Satellite Home Viewer Act )**

**and**

**In the Matter of Definition of an )  
Over-the-Air Signal of Grade B ) RM No. 9335  
Intensity for Purposes of the )  
Satellite Home Viewer Act )**

**To: The Commission**

**COMMENTS  
OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

**Of Counsel:**

**Matthew M. Polka  
President  
Small Cable Business Association  
100 Greentree Commons  
Pittsburgh, Pennsylvania 15220  
(412) 937-0005**

**Eric E. Breisach  
Christopher C. Cinnamon  
Lisa M. Chandler**

**Bienstock & Clark  
5360 Holiday Terrace  
Kalamazoo, Michigan 49009  
(616) 353-3900**

**September 4, 1998**

### **SUMMARY**

The petitions for rulemaking, filed by the National Rural Telecommunications Cooperative ("NRTC") and Echostar Communications Corporation ("Echostar") (collectively "Petitioners"), merely represent another attempt by satellite carriers to circumvent the need to seek congressional action. DBS providers have repeatedly sought to shortcut the need to have Congress exercise its exclusive authority to modify the satellite carrier compulsory license. Congress established a clear definition of "unserved households" for purposes of the satellite carrier compulsory license. It is irrelevant whether DBS providers like the current definition. Federal statute, not administrative rules, govern the satellite carrier compulsory license and its associated definitions. Therefore, the Petitioners must go to Congress to seek the changes they request and not circumvent Congress' authority as the Petitioners are trying to do here.

## **TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	THE COMMISSION LACKS AUTHORITY TO TAKE THE ACTIONS REQUESTED BY NRTC AND ECHOSTAR. ....	2
	A. The legislative history of SHVA shows Congress' intent to give satellite carriers only a limited ability to import signals. ....	3
	B. Congress intended that the Commission's definition of "Grade B intensity" used for broadcast purposes also determine "unserved households," not for the Commission to establish a separate standard. ....	4
	C. Where Congress desires that the Commission take some particular action, it has so directed. ....	6
III.	CONCLUSION .....	8

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**Petition for Declaratory Ruling and )  
Rulemaking with Respect to )  
Defining, Predicting and Measuring ) RM No. 9345  
Grade B Intensity for Purposes of )  
the Satellite Home Viewer Act )**

**and**

**In the Matter of Definition of an )  
Over-the-Air Signal of Grade B ) RM No. 9335  
Intensity for Purposes of the )  
Satellite Home Viewer Act )**

**To: The Commission**

**COMMENTS OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

**I. INTRODUCTION**

The satellite carrier compulsory license established by the Satellite Home Viewer Act ("SHVA") represents a carefully-crafted balance between: (1) the interests of the satellite industry, its users, and promoting distribution of network programming; and, (2) the well-established interests of sustaining the network-local affiliate relationship to promote localism. Regardless of whether the Petitioners identify inadequacies in the current provisions, which they do not, the Commission lacks authority to take corrective measures. Only Congress, by virtue of its constitutional authority to legislate in the area of intellectual property, may take steps, if necessary, to make changes to the existing structure of the satellite carrier compulsory license.

SCBA, with approximately 300 members serving more than two million subscribers

nationwide, remains the only voice solely dedicated to representing the interests of smaller, independently owned cable businesses. Because of the far-reaching impact of the changes proposed by the above-captioned Petitions for Rulemaking, SCBA takes this opportunity to file its consolidated comments.

In their most recent attempt to circumvent Congress' authority to legislate in the field of copyright, the Petitioners ask the Commission to initiate a rulemaking proceeding to fashion a unique definition of Grade B for purposes of the satellite carrier compulsory license.<sup>1</sup> Because the Commission lacks authority to take such actions, it must deny NRTC's and Echostar's Petitions for Rulemaking.

## **II. THE COMMISSION LACKS AUTHORITY TO TAKE THE ACTIONS REQUESTED BY NRTC AND ECHOSTAR.**

NRTC and Echostar request that the Commission initiate a rulemaking to substantially modify the definition of "unserved household" for purposes of SHVA. Notwithstanding the Petitioners' passionate appeals, the Commission simply lacks authority to undertake this task. The satellite carrier compulsory license strikes a careful balance between the interests of the satellite industry and the need to protect the network-affiliate relationship and localism. The ability to change this delicate balance rests solely

---

<sup>1</sup> See *In the Matter of Definition of an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act*, Emergency Petition for Rulemaking of the National Rural Telecommunications Cooperative, RM No. 9335 (filed July 8, 1998) ("NRTC Petition"); *Petition for Declaratory Ruling and Rulemaking With Respect to Defining, Predicting and Measuring "Grade B Intensity" for Purposes of the Satellite Home Viewer Act*, Petition for Declaratory Ruling and/or Rulemaking of Echostar Communications Corporation, RM No. 9345 (filed August 18, 1998) ("Echostar Petition").

with Congress.<sup>2</sup>

**A. The legislative history of SHVA shows Congress' intent to give satellite carriers only a limited ability to import signals.**

Congress designed the satellite carrier compulsory license as a limited license.<sup>3</sup>

NRTC and Echostar now seek to expand the satellite carrier compulsory license to go beyond that which Congress intended.

SHVA represents a balanced measure. SHVA arose from Congress' "recognition of the fact that a *small percentage* of television households [could not] receive clear signals embodying programming of the three national television networks."<sup>4</sup> It "clarif[ies] the legislative status under the Copyright Act of satellite carriers that retransmit television broadcast signals to [home satellite dish] owners."<sup>5</sup> SHVA strikes an important balance of interests: it addresses the needs of the home satellite dish industry and users, without jeopardizing the network-affiliate relationship or localism.<sup>6</sup>

---

<sup>2</sup> H.R. Rep. No. 100-887(I), 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), 1988 U.S.C.C.A.N. 5577, 5612 (*"House Report I"*) (citing U.S. Const. art I, § 8, cl. 8 which grants Congress the authority to "modify, amend or expand this country's intellectual property laws." *House Report I* at 5612.).

<sup>3</sup> See H.R. Rep. No. 100-887(II), 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988), 1998 U.S.C.C.A.N. 5577, 5648 (*"House Report II"*) ("Under the bill, satellite carriers are provided a limited interim compulsory license for the sole purpose of facilitating the transmission of each network's programming to "white areas" which are unserved by that network.")

<sup>4</sup> *House Report I* at 5621 (emphasis added).

<sup>5</sup> S. Rep. No. 103-407, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (1994), 1994 WL 577581 at Part II.A (*"Senate Report"*).

<sup>6</sup> *House Report I* at 5617; see also *House Report II* at 5648 (expressing the belief of the House of Representatives Committee on Energy and Commerce that the "limited interim compulsory license . . . will satisfy the public interest in making available network

**B. Congress intended that the Commission's definition of "Grade B intensity" used for broadcast purposes also determine "unserved households," not for the Commission to establish a separate standard.**

Congress did not delegate to the Commission authority to define "Grade B intensity" for purposes of SHVA's satellite carrier compulsory license. Instead, Congress looked to the Commission's existing definition of "Grade B intensity" as the criterion for determining whether a household is an unserved household. The legislative history of SHVA offers strong support for this conclusion. SCBA provides several examples below.

Congress' own words confirm its intention that a fixed definition of Grade B intensity applies. The *House Report II* referred to "a signal of Grade B intensity (as defined by the FCC, currently in 47 C.F.R. section 73.683(a))."<sup>7</sup> Congress' initial use of the phrase "currently in 47 C.F.R. section 73.683(a)" suggests its intention to apply the Grade B signal strength that existed at the time of SHVA's enactment.

The *Senate Report* to the Satellite Compulsory License Extension Act of 1994 ("1994 SHVA") also makes clear that Congress intended to establish by statute the definition of "Grade B intensity," rather than authorize the Commission to modify or create its own definition. With the 1994 SHVA, Congress made changes to certain definitions. For example, it updated the definition of "local service area of a primary transmitter" under 17 U.S.C. § 111(f). Realizing that the Commission may make further changes to the definition at issue, the Senate Committee on the Judiciary ("Senate Committee")

---

programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system.")

<sup>7</sup> *House Report II* at 5854.



specifically stated that "[s]uch modifications will be incorporated into the additional definition of a 'local' signal provided by this legislation."<sup>8</sup>

In contrast, Congress did not revise the definition of "unserved household," nor did it specify that the definition will incorporate Commission changes to the definition of "Grade B intensity." Congress therefore intended for the existing definition of "Grade B Intensity" to apply. "[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."<sup>9</sup> By preserving the definition of "unserved household" in the 1994 SHVA without alteration, Congress intended that definition to retain the meaning it had as originally enacted – the Commission's existing definition of Grade B intensity. That Congress did not explicitly state that the Commission may make changes to the unserved household definition, as it had for purposes of other definitions, supports this conclusion.

Finally, Congress' incorporation of the Grade B contour as part of its transitory enforcement mechanism to arbitrate disputes involving the status of households as unserved evidences Congress' intent to use existing Commission definitions, not to create new measures. In the 1994 SHVA, Congress created a mechanism to enforce rights

---

<sup>8</sup> *Senate Report*, 1994 WL 577581 at Part V.3.

<sup>9</sup> *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66 (1982) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

affected by the satellite carrier compulsory license.<sup>10</sup> The enforcement mechanism calls for actual measurements where a broadcast television station challenges a particular household's status as unserved. The mechanism, however, specifically adopts the use of the Grade B contour in making such determinations, establishing different procedures depending on whether a household is within or beyond the Grade B contour.<sup>11</sup> On the one hand, the enforcement mechanism signals Congress' recognition that there is a need for individual determinations, using actual measurements, of whether a household is served. At the same time, Congress' specific reliance on the Grade B contour reinforces that Congress intended to use the Commission's established definition of Grade B intensity. Congress did not intend or authorize the Commission to develop a separate Grade B definition and methodology to predict Grade B contours for SHVA purposes.

**C. Where Congress desires that the Commission take some particular action, it has so directed.**

Where Congress wants the Commission to exercise its jurisdiction as an expert regulatory agency, it has so directed. In its *House Report II*, Congress ordered the FCC

---

<sup>10</sup> See 17 U.S.C. § 119(a)(8) (Although the enforcement mechanism contained in Section 119(a)(8) was transitory in nature and has expired, Congress believed that use of the Grade B contour is the appropriate criteria to determine which households fall within the definition of "unserved households.").

<sup>11</sup> See 17 U.S.C. § 119(a)(8). For purposes of the enforcement mechanism, the Grade B contour serves as a demarcation point — within the Grade B contour, the satellite carrier must test the signal strength to determine if a household qualifies as unserved; beyond the Grade B contour, the station must prove it does not. The enforcement mechanism suggests the following rebuttable presumption: households within the Grade B contour are served households; those beyond the contour are not.

to consider the feasibility of applying the syndicated exclusivity rules to satellite carriers.<sup>12</sup> Had Congress also wanted the Commission to consider other issues related to the satellite carrier compulsory license, specifically, defining how to measure signal strength to identify unserved households, it would have. It did not. The Commission must accept Congress' silence on the matter as evidence of its intent that the FCC not make changes to the definition of "Grade B intensity."

That Congress made no changes to the definition of "unserved household" in the 1994 SHVA strengthens the conclusion that it did not intend for the Commission to exercise any authority in this realm. Halling the satellite compulsory license a success, the Senate Committee found that

The satellite carrier compulsory license has fulfilled its stated purpose of providing a clear cut statutory framework for the delivery of broadcast households to HSD owners, and by expanding the access of rural and other households to broadcast programming. The license balances the rights of copyright owners, by ensuring payment for the use of their property rights, with the rights of satellite dish owners, by assuring availability at reasonable rates of retransmitted television signals.<sup>13</sup>

Had Congress believed it necessary for the Commission to exercise its authority as the expert regulatory agency with respect to the issue of defining "Grade B intensity," Congress would have directed the Commission to so act — it did not.

---

<sup>12</sup> *House Report II* at 5656.

<sup>13</sup> *Senate Report*, 1994 WL 577581 at Part III.

### III. CONCLUSION

Under the auspices of requesting changes to the definition of Grade B Intensity, the Petitioners ask the Commission to create a new signal strength standard and measurement methodology for use under SHVA. The Commission, however, lacks authority to undertake this task. Consequently, the Commission must deny NRTC's and Echostar's Petitions and leave any changes regarding the determination of "unserved household" to the appropriate authority — Congress. SCBA therefore respectfully requests that the Commission deny NRTC's and Echostar's Petitions.

Respectfully submitted,

**SMALL CABLE BUSINESS  
ASSOCIATION**

Of Counsel:

Matthew M. Polka  
President  
Small Cable Business Association  
100 Greentree Commons  
Pittsburgh, Pennsylvania 15220  
(412) 937-0005

By: EE Breisach / LMC

Eric E. Breisach  
Christopher C. Cinnamon  
Lisa M. Chandler

Bienstock & Clark  
5360 Holiday Terrace  
Kalamazoo, Michigan 49009  
(616) 353-3900

September 4, 1998